

## FCPA Enforcement: Why the Increase between the First 25 Years and the Last 5?

On Thursday, March 10, the World Compliance Tour came to Houston. It featured presentations by Michael Volkov, of the law firm of Mayer Brown; Ryan Morgan, of World Compliance; and Richard Cassin, author of the FCPA Blog. The session was very informative on a wide range of topics related to the Foreign Corrupt Practices Act (FCPA). This post will focus on Cassin's presentation and his theory for the dramatic increase in FCPA enforcement over the past five years.

Most FCPA practitioners are familiar with the increase in enforcement actions by both the Department of Justice (DOJ) and Securities and Exchange Commission (SEC). The numbers bear this out, as shown in this summary chart.

Year	SEC Enforcement Actions	DOJ Enforcement Actions
2004	3	2
2005	5	7
2006	8	7
2007	20	18
2008	13	20
2009	14	26
2010	26	48

There have been many theories as to why this increase occurred. One is that companies were forced to review and report failures in books and records testing required under Sarbanes Oxley. Another, perhaps more cynically, is that the government discovered a cash cow in the form of fines, penalties and profit disgorgement from FCPA criminal and civil enforcement actions. However, Cassin presented another theory, being that the change all came about after 9/11.

Cassin posited that the events of 9/11 changed the US Government's perception of corruption. Investigations into the full scope of 9/11 demonstrated that foreign governmental corruption can lead to leaky borders, problems with passport control, immigration issues and corrupt influences which allow foreign governments to release information that it would normally keep reserved. These, and perhaps other factors, led then President George W. Bush to "ramp up enforcement efforts against corrupt based upon national security concerns."

As evidence of this he pointed to two of his blog posts on the subject of Presidential Proclamation 7750. Cassin wrote in post entitled, *Concerning the Kleptocrats, Part I* that Proclamation 7750 "suspended entry into the United States of past and present foreign officials whose corrupt practices have had "serious adverse effects on the international economic activity of U.S. businesses, U.S. foreign assistance goals, the security of the United States against transnational crime and terrorism, or the stability of democratic institutions and nations." Also barred from entry are the foreign officials' spouses, children, and dependents who benefited from the corruption."

In his second posting on Proclamation 7750, entitled, “*Proclamation 7750 Unwrapped*” Cassin wrote about his discussions with anonymous background sources from the US State Department, the US agency tasked with implementing Proclamation 7750. These sources told him that FCPA does not “reach the kleptocrats -- it applies only to bribe-payers and not bribe-takers. And the truth, as the kleptocrats know, is that they're beyond the reach of practically all the laws of other countries. There just aren't that many big sticks to use against corrupt foreign officials.”

In addition to the national security issue, Cassin listed what he believed to be other factors in the continued increase in FCPA enforcement actions, after the change to the Obama Administration. These factors included that President Obama has elevated the discussion by linking corruption as a violation of basic human rights; the new Dodd-Frank Whistleblower program, which Cassin reported is bringing in one tip per day to the SEC; and that various international NGOs are performing investigations regarding corruption and providing this information to the US Government. Finally, noted by Michael Volkov in his presentation; if you ramp up and hire more new federal agents and attorneys to enforce anti-corruption, these new government employees will find something to enforce.

Cassin's conclusion is that increased FCPA enforcement is here to stay. He listed several countries which have implemented or enhanced their respective national anti-corruption laws. He even point to China, which he featured in his March 10 blog posting, which recently passed a law that prohibits Chinese nationals and PRC companies from paying bribes to non-PRC government officials.

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